Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
IP-Enabled Services	)	WC Docket No. 04-36

REPLY COMMENTS OF NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION AND SUMMARY

Cable companies are among the numerous entities beginning to deploy IP-based voice services, and in fact, are among the leaders in deploying Voice over Internet Protocol ("VoIP") services. As a result of more than $85 billion of private investment in upgrades and enhancements to cable infrastructure since 1996, cable operators are preparing – and in some cases, have begun – to provide innovative facilities-based VoIP services in many areas of the country. Analysts estimate that by year-end 2004 cable operators will have deployed VoIP in cable systems passing more than 24 million homes, and that number will rise to more than 95 million homes passed by year-end 2007.[1]

The Commission initiated this rulemaking proceeding to "examine issues relating to services and applications making use of Internet Protocol."[2] NCTA's initial comments in this proceeding focused on VoIP services rather than all "IP-enabled services" and NCTA

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[1] Kagan World Media, Broadband Technology, February 10, 2004, at 2.

[2] *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) ("*NPRM*").

recommended that the Commission focus its attention in the same manner. This is because "VoIP services are a reality and are rolling out even as this proceeding rolls on."[3] NCTA further explained that while there are many unknowns in terms of VoIP business models, consumer acceptance, service features, and the competitive landscape, the biggest unknown is the regulatory model that will govern VoIP deployment. NCTA recommended a minimal regulatory regime, implemented with "utmost urgency."[4] The vast majority of commenters agree with this prescription – minimal regulation, under a quickly adopted framework.[5]

In our initial comments, we urged the Commission to establish a balanced framework delineating the rights and responsibilities of VoIP providers whose services meet a four-prong test which is described in the following section. NCTA further urged the Commission to avoid the imposition of "legacy" telephony regulations that are unnecessary in the context of competitive services. Agreeing with NCTA, commenters were virtually unanimous in recommending the appropriate imposition of specific public health and safety responsibilities. Nearly as many commenters agreed that "legacy" regulations are both burdensome and unnecessary. Moreover, most commenters, with the exception of certain state regulatory bodies and a few others, argued for a limited role for state regulators. While NCTA agrees that states should not impose economic or legacy regulations on VoIP services, states do have an important role in overseeing interconnection agreements and resolving related disputes. Finally, facilities-based providers emphasized the need for specific rights that are vital for the development of facilities-based competition.

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3 *See* Comments of NCTA at 2.

4 *Id.* at 3.

5 *See e.g.* Comments of BellSouth at 10; Comments of Verizon at 16; Comments of AT&T at 15; Comments of Comptel at 5; Comments of VON Coalition at 28.

There was also considerable consensus in the initial comments concerning the need to distinguish between those IP-based voice services that should be subject to a minimal regulatory regime and those which should not be subject to regulation. NCTA, for its own part, laid out a four-prong test which distinguishes between such services, and which most other commenters effectively endorsed in whole or in part. We explain below why the four-prong test is both consistent with, and superior to, other proposals.

In our initial comments, we explained at length the benefits of facilities-based competition in the provision of VoIP and voice services generally. Many commenters agree that facilities-based competition is valuable. However, some commenters sought to impose discriminatory conditions, regulations or fees on facilities-based providers. These commenters range from non-facilities based providers advocating regulation of their competitors, to rural carriers seeking the imposition of new universal service obligations on cable broadband, to local governments seeking to impose new fees – especially rights-of-way fees – on facilities-based providers. We demonstrate below how and why these policy prescriptions would impede the rollout of broadband facilities as well as facilities-based VoIP services.

I. THERE IS WIDESPREAD AGREEMENT THAT KEEPING REGULATION TO A MINIMUM WILL PROMOTE THE CONTINUED DEVELOPMENT AND DEPLOYMENT OF IP-BASED VOICE SERVICES

Commenters from across the spectrum, namely Regional Bell Operating Companies ("RBOCs") to competitive local exchange carriers ("CLECs"), to VoIP service providers, to high-tech trade associations, and even some state regulatory bodies, agreed with NCTA and cable company commenters that VoIP services will flourish only to the extent that regulation is

kept to a minimum. These same parties agreed with NCTA on the importance of mandating certain social policy obligations on VoIP providers.[6]

A. CALEA Should Apply to Providers of VoIP Service

With respect specifically to the Communications Assistance for Law Enforcement Act ("CALEA"), NCTA largely agrees with the comments of the Department of Justice ("DOJ"). In particular, DOJ stated in its initial comments that "the Commission's actions in the IP NPRM proceeding should be consistent with and not prejudice the outcome of the CALEA rulemaking proceeding."[7] DOJ went on to explain that "in the case of CALEA, the question of whether CALEA's requirements should apply is defined by the CALEA statute itself, which establishes a simple rule: If an entity is a telecommunications carrier as defined in Section 102(8) thereof, then it is legally obligated to meet CALEA's assistance capability requirements under Section 103 …. Scope and applicability of CALEA are determined solely by reference to CALEA's unique definition of 'telecommunications carrier,' which is inclusive of and broader than the definition in the Communications Act."[8]

NCTA agreed with both of these points in Reply Comments filed in response to the DOJ/FBI/DEA Joint Petition for Declaratory Rulemaking.[9] In supporting the issuance of a declaratory ruling that providers of VoIP services are properly viewed as "telecommunications

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6 *See e.g.*, Comments of Covad at 22; Comments of Federation for Economically Rational Utility Policy at 14; Comments of Level 3 at 35; Comments of Information Technology Industry Council at 6; Comments of Qwest at 42; Comments of Telecommunications Industry Association at 9; and Comments of Verizon at 47.

7 Comments of DOJ at 2.

8 *Id*. at 13 (citations omitted).

9 *See United States Department of Justice, Federal Bureau of Investigation and Drug Enforcement Administration Joint Petition for Rulemaking to Resolve Various Outstanding Issues Concerning the Implementation of the Communications Assistance for Law Enforcement Act*, RM-10865, Reply Comments of NCTA (filed April 27, 2004) ("CALEA Reply") at 9.

carriers" for purposes of CALEA,[10] we demonstrated that such a declaratory ruling need not, and should not, prejudge the classification issues raised in this rulemaking.[11]

B. While States Should Neither Engage in Economic Regulation nor Impose Legacy Utility Regulations on VoIP Service Providers, They Have a Role in Overseeing Interconnection Agreements

Most commenters, with the exception of certain state regulatory bodies and a few others, argue for a limited role for state regulators. As NCTA demonstrated, and many commenters agreed, legacy telephony utility requirements and economic regulations – such as numerous regulations relating to billing, payment, credit and collection, and quality of service standards – are inappropriate for competitors using nascent technologies that offer alternatives to incumbent providers.[12]

States do, however, have an important role to play in overseeing interconnection agreements and resolving related disputes. As Cox Communications explains, "[e]nforcement and dispute resolution are important elements of any regulatory regime. Without access to speedy enforcement and dispute resolution, competitive service providers will find their actions stymied by incumbent intransigence and delays."[13] NCTA agrees with Cox that the states "can best resolve many of the implementation and technical issues that arise as alternative telephone

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[10] NCTA's support was subject to two qualifications. *First*, the Commission should include within the scope of its ruling all similarly situated providers of VoIP services, including services like Vonage and CallVantage. *Second*, the Commission should make clear that, when services like Vonage and CallVantage are provided over the facilities of other companies (say, cable operators), the responsibility for complying with CALEA lies with the VoIP services provider, not the facilities owner. *Id*. at 10.

[11] We noted therein that CALEA defines "telecommunications carrier" differently than does the Communications Act: Under CALEA, the term includes any provider of "wire or electronic switching or transmission service" if the Commission finds (1) "that such service is a replacement for a substantial portion of the local exchange service" and (2) "it is in the public interest to deem such person or entity to be a telecommunications carrier for purposes of this title." 47 U.S.C. § 1001(8)(B)(ii). *Id*. at 2.

[12] *See e.g.*, Comments of Net2Phone at 19; Comments of Arizona Corporation Commission ("ACC") at 2; Comments of BellSouth at 8; Comments of Computer and Communications Industry Association at 15.

[13] Comments of Cox at 13-14.

services are brought to market and are established as viable competitors." By contrast, "[t]he Commission, with its many obligations, limited resources and geographic isolation, is less suited to this role."[14] Because of the resource constraints and multiple responsibilities faced by the Commission it would be difficult for the Commission to address the number of complaints and disputes that would be brought before it if there were no state-level alternative for providers of IP-enabled voice services.

Charter Communications similarly notes that state commissions have an important role to play "in policing the relationship between VoIP providers and existing PSTN entities … [including] resolution of interconnection disputes with PSTN entities."[15] The Commission should be mindful of this role for state regulatory bodies as it considers how best to create the appropriate regulatory framework for VoIP services, and particularly for facilities-based VoIP services.

C. NCTA's Four-Prong Test is Consistent With – and Superior to – the Various Other Proposals for Determining Which IP-Based Voice Services Should Be Subject to the Commission's Regulatory Framework

In our initial comments, we offered a four-prong test to determine which IP-based voice services would qualify for the recommended minimally regulatory framework, which IP-based services would be regulated as conventional telecommunications services, and which IP-based voice services would be unregulated.[16] This approach of establishing specific criteria for making

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[14] *Id*. at 14.

[15] Comments of Charter at 16. *See also* fn. 14 noting that reduced regulation of VoIP providers would free up state commission resources to focus on critical areas such as resolving interconnection disputes.

[16] Comments of NCTA at 9. A service would be subject to the Commission's regulatory framework if:

- the service makes use of North American Numbering Plan ("NANP") resources;
- it is capable of receiving calls from or terminating calls to the PSTN at one or both ends of the call;
- it represents a possible replacement for POTS; and

such determinations was widely endorsed although the specifics differed to some extent among commenters. Two criteria for identifying IP-based voice services that should be subject to the Commission's regulatory framework were common to almost all of the proposals, namely connection to the public switched telephone network ("PSTN test") and use of North American Numbering Plan resources ("NANP test").[17]

NCTA's four-prong test includes the PSTN and NANP tests as well as two other criteria for identifying the subset of VoIP services eligible for minimal regulation, namely that the service is a possible replacement for current telephone services, and that it uses IP transmission between the service provider and the end-user customer. As we explained, if an IP-enabled service (even one with a voice component) does not satisfy *each* of the first *three* prongs of this test, it would remain unregulated at this time. This test would properly exclude from regulation innovative services – even those that include voice components – that are not possible replacements for traditional legacy telephony services. For instance, IP applications such as voice communications overlaid on video gaming or video chat, which do not use NANP resources or have the ability to receive calls from or terminate them to the PSTN, would be shielded from unnecessary and inappropriate regulation so that they can develop most creatively.

Any VoIP service meeting all four prongs of the test would be subject to a minimal regulatory regime under which the service would enjoy appropriate rights and bear certain responsibilities necessary to preserve specific public health, safety, universal service and related

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- it uses IP transmission between the service provider and the end user customer, including use of an IP terminal adapter and/or IP-based telephone set.

[17] *See e.g.*, Comments of Public Utilities Commission of Ohio at 4; Comments of Illinois Citizens Utility Board at 7; Comments of Bell South at 8; Comments of ACC at 8.

public duties.[18] Services meeting the first three prongs of the test but not the fourth (*i.e.*, those lacking an IP-based connection to the end user), by contrast, would remain regulated as conventional telecommunications services.[19]

Thus, the effect of these additional criteria is to establish both a minimum and maximum boundary for determining the level of regulation to which a service is subject. That is, the PSTN test and NANP test are generally proposed only as a way of distinguishing regulated services from unregulated services. Standing alone, however, these criteria fall short as they do not sufficiently distinguish less regulated VoIP services from conventionally regulated services. The four-prong test, however, would distinguish both unregulated from minimally regulated services, and minimally regulated from conventionally regulated services

II. VOIP SERVICE OFFERINGS OF FACILITIES-BASED AND NON-FACILITIES BASED PROVIDERS SHOULD BE TREATED EQUALLY

NCTA's initial comments demonstrated the importance of facilities-based VoIP competition, noting that "VoIP offers the potential for realizing a central objective of the Telecommunications Act of 1996 – the introduction of facilities-based competition into the local voice services market."[20] We explained that the Commission's regulatory framework "should be applied equitably to all VoIP providers meeting the four-prong test, whether or not they own network facilities. Imposing greater regulatory burdens on providers that invest in networks

[18] In addition to the cable VoIP service offerings described in NCTA's Comments, Vonage and AT&T's CallVantage would meet the four-prong test. NCTA also pointed out that it may be appropriate to minimize the regulatory regime applicable to competitive local exchange carriers ("CLECs") utilizing circuit-switched technology. NCTA at 10, fn. 15.

[19] Whether or not a VoIP service meets only the first three prongs of the test or all four prongs, a service provider could be designated as an eligible telecommunications carrier so long as it satisfies the requirements of Section 214(e) and Section 54.201 *et seq.* of the Commission's rules.

[20] NCTA at 4, especially fn. 5.

could undermine the Commission's goal of promoting facilities-based competition."[21] We went on to explain that "VoIP providers, particularly those that finance and build infrastructure to enable delivery of these services in competition with established local exchange carriers, [must not be] placed at a disadvantage vis-à-vis VoIP providers who build no facilities."[22]

Some commenters, however, insist that cable companies providing VoIP services must be subject to greater regulation in their offering of VoIP services than providers that have not built out their own facilities. In some cases they go so far as to argue that *non*-facilities-based providers should be *completely* unregulated. Not surprisingly, it is chiefly those providers that have chosen not to invest in the broadband facilities necessary to enable competition who seek regulation of those providers who have undertaken such investment. As the number of facilities-based broadband providers increases, such regulation is not only discriminatory, but it is counter-productive because it limits the incentive for additional investment, innovation and deployment of facilities.

Proponents of regulation of facilities-based providers typically invoke one of two rationalizations. As described below, some invoke an artificial "layered" approach under which their services – as "applications" – escape regulation, while the competitive facilities of providers with which they compete are regulated. Others call for the imposition of regulations meant to ensure "network neutrality" in a marketplace widely acknowledged to be "neutral" without such regulations. As we discuss below, the Commission should reject these rationalizations as unnecessary and harmful.

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[21] *Id*. at 5.

[22] *Id.* at 15.

Efforts to impose discriminatory conditions on facilities-based providers go beyond the imposition of new regulatory burdens. Various commenters also seek to impose new financial burdens on cable broadband facilities, such as new universal service fees and rights-of-way fees. It is reasonable to assume that these commenters would extend such obligations to others investing in competitive broadband facilities, including Broadband over Power Line ("BPL") and wireless broadband providers. For the reasons described below, the Commission should reject these efforts as well. And just as cable companies should not be subject to additional burdens vis-à-vis non-facilities-based providers, it is also important that non-facilities-based providers face the same responsibilities as facilities-based providers (*e.g.*, CALEA and E-911).

A. Efforts to Impose New Regulatory Obligations on Cable Broadband Facilities Providers are Misplaced

A handful of commenters have argued that providers of competitive broadband facilities merit special regulatory attention.[23] These commenters, unlike facilities-based broadband providers, have chosen to employ business models that do not require them to make capital-intensive investments, financed with private risk capital. Rather, their business models depend on no-cost or low-cost access to the facilities of others. In order to sustain these business models they demand that facilities owners face increased regulatory scrutiny, and in many instances increased regulation of their facilities. Such suggestions are as inappropriate in the context of IP-enabled voice services as they are in the context of broadband service generally. As NCTA explained in its recent Section 706 Reply Comments:

> When contrasted with comments [of] parties who are actively deploying broadband and those of near-term new facilities-based providers, the comments of parties seeking Commission sanction for access to the underlying facilities of providers comes across as anachronistic. When there was only one means by

[23] *See* AT&T at 48; Comments of MCI at 13; Comments of Vonage at 8.

> which MCI and AT&T, and their customers, could obtain access to end-users for their long distance services, it was necessary for the Commission to establish and enforce regulations that guaranteed long distance carriers local access and facilitated choice for consumers. The Commission should explicitly acknowledge changed circumstances. In particular, legacy regulations of a monopoly era should not be implemented to reward the very companies that have chosen *not* to invest in the provision of facilities-based broadband alternatives. [24]

In fact, there are at least two broadband platforms widely available today because cable companies took the business risk in building out a competitive infrastructure, and once consumer demand for broadband was established, local telephone companies followed suit. Now, broadband competition is fierce between the cable and local telephone industries. Moreover, other facilities-based broadband providers are at various stages of development and deployment, and these new entrants will provide consumers with even more facilities-based choices. As a result, imposing requirements for access to cable broadband networks or similar schemes are unwarranted and would be counter-productive, stifling investment and innovation just when broadband services are seen as an economic and technological boon to the Nation. The Commission should reject short-term regulatory actions designed to assist parties – in many cases, multi-billion dollar companies – that have chosen not to invest in competitive broadband facilities, because any such actions will tend to inhibit the development of additional facilities-based competition.

[24] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 04-54, Reply Comments of NCTA (filed May 24, 2004) ("Section 706 Reply") at 23 (internal citations omitted; emphasis in original).

1. The So-Called "Layered" Approach Offers No Legitimate Rationale for Regulation of Cable Broadband Facilities

The Commission asks whether the so-called "layered" approach offers any guidance in structuring a regulatory regime for IP-enabled services.[25] As the Commission has explained, under the layered approach, "regulation would differentiate not among different platforms, but rather among various aspects of a particular offering – distinguishing, for example" the underlying transmission facility, communications protocols used over that facility, and applications used by the end user.[26]

Vonage and certain parties, which as noted above have elected not to invest in last-mile facilities, are all too eager to recommend that the Commission adopt this approach as a rationale to regulate the facilities of others. Most focus exclusively on ILECs.[27] A handful of commenters take a more scattershot approach offering feeble justifications for including cable operators in this regulatory paradigm.[28] Vonage, for example offers the principle that regulation is appropriate for markets that are distorted either because certain market players are able to exert power over the marketplace such that competition is no longer the governing force, or to protect externalities, such as social goods, that the marketplace may not deliver if left to its own devices.[29] An admirable principle to be sure, but Vonage falls short of offering any facts which would justify regulation of cable facilities under this principle.

Put another way, advocates of the layers model assert that the key is regulation of a layer when some market failure exists. In the case of the transmission or "physical" layer they assert

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[25] *See NPRM* at ¶ 37.

[26] *Id.*

[27] *See e.g.*, Comments of ALTS at 4; *see also* Comptel at 11; ACC at 8; *and* Comments of Z-Tel at 18.

[28] *See e.g.*, AT&T at 49; *see also* MCI at 16; *and* Vonage at 8.

[29] Vonage at 6.

"market failure" by proclaiming it a bottleneck facility. No evidence is offered that, at least with respect to cable broadband, market failure or a bottleneck facility exists. Indeed the specific references to "bottleneck" or "essential" facilities, even in the comments of those proposing some regulation of cable, refer only to ILEC facilities.[30]

AT&T takes a slightly different approach and premises a call for regulation of all facilities-based providers, including cable, based on the alleged market power of these providers. As noted above, however, this ignores the fact that competitive facilities-based broadband alternatives are already available and are steadily increasing. Indeed, in addition to cable and DSL, there are at least four other distribution mechanisms involving numerous providers that are either offering broadband services, or are at various stages of developing plans to do so – licensed wireless, unlicensed wireless, Broadband over Power Line and satellite delivery. Some or all compete – or will compete – directly with cable and DSL over the near term.[31]

2. Regulation Is Unnecessary To Ensure So-Called "Network Neutrality"

Building on the layered approach, some commenters, who have notably not invested in broadband facilities, call for "network neutrality" regulations to be imposed on entities that have.[32] With respect to cable at least, this argument is misplaced. Not only is there no evidence of harm, but, to the contrary, cable's massive, unsubsidized investment of private capital in broadband facilities (and the subsequent investments of broadband competitors) has enabled Vonage to flourish and other VoIP providers such as AT&T to launch their VoIP offerings.

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[30] *See* MCI at 5, 6, and 21; *See also* AT&T at 48.

[31] *See* Section 706 Reply at 4.

[32] *See* Vonage at 13 (laying out network neutrality principles - consumers must be free to access content, use applications, and attach personal devices [such as gaming equipment, home networking routers and VoIP devices] to their broadband modems). *See also* AT&T at 53 (asking the Commission to ensure that broadband users can reach any web site for any purpose including to access VoIP providers.)

Indeed, the very success of Vonage belies the claim that any such regulation is necessary. Acting now on hypothetical fears will deter the continued broadband buildout and enhancements that the public and policymakers want to encourage.

Ironically, Vonage states in its comments that is "is a believer in free markets, and does not advocate premature, unnecessary government intervention in any aspect of the Internet economy. Indeed, Section 230 places a significant burden on all government regulators to justify intervention in the workings of the Internet."[33] For Vonage, this sentiment may be no more than rhetoric given its concurrent presentation of an attempted rationale for regulating Internet access facilities.

Vonage attempts to justify its call for network neutrality regulations by claiming that the intellectual basis for the "essential framework" of the Internet is "under attack." It cites a speech by the Chief of the FCC's Media Bureau questioning whether the Commission has the authority to impose network neutrality regulations; a recent Cato Institute report questioning the wisdom and need for such regulations; and a report by an analyst firm, the Yankee Group, suggesting that cable operators may have an incentive to slow down Vonage's service (while hastening to question how likely such a scenario would be).[34] In effect, its case for the claim that the framework of the Internet is under attack, and its case for imposing regulations on cable operators boils down to this: an FCC Bureau Chief questioned the FCC's authority; a think tank questioned the need for regulation; and an analyst report said cable operators might, or on second thought might not, do something. This is hardly the basis for imposing costly and burdensome regulations on competitive broadband facilities providers. Vonage goes on to cite an example of

[33] *Id*. at 10.

[34] *Id.*

a single discriminatory action by one ISP, and a single comment by a rural ILEC at a regulatory forum that it *could possibly* discriminate against Vonage as warranting Commission action. Again, justifiable regulation must be built on sterner stuff – especially as to cable operators that are not implicated in either example (nor are there any such examples to cite).[35]

AT&T, for its part, theorizes as to how broadband providers might discriminate against VoIP competitors. It claims that broadband providers *could* block access to rivals' servers and websites or broadband providers *could* use anticompetitive tying policies. However, AT&T cannot point to any actual practices on the part of any cable operator that would warrant regulation. Instead, it points to the practice of certain RBOCs of requiring DSL customers to purchase POTS lines in order to receive DSL service.[36] Yet, like Vonage, it offers no claim that cable operators *are* engaging in this or other discriminatory practices.

Without a hint of irony, AT&T and Vonage point to pledges made by cable operators (AT&T itself in its acquisition of TCI and MediaOne, and Comcast in its subsequent acquisition of AT&T Broadband) that they would not engage in activities of the kind feared. Vonage notes that "similar concerns were heard four years ago."[37] What they fail to point out is that in the intervening four years those concerns have proven to be imaginary, as cable operators have not engaged in such behavior. Indeed, when those pledges were made, AT&T itself argued persuasively that the imposition of government-mandated access obligations on cable operators in advance of demonstrated problems is unwarranted and would inhibit broadband investment by

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[35] *Id*. at 11.

[36] AT&T at 50.

[37] Vonage at 11. *See also* AT&T at 51 (noting cable operator agreements not to engage in the types of practices to which AT&T objects).

cable companies.[38] Moreover, contrary to AT&T's suggestion in this proceeding, the burdens, uncertainty, and likelihood of regulatory gaming from net neutrality regulation is as significant as the risks they rightly identified in connection with "open access."

AT&T makes the unsupported – and unsupportable – claim that "[i]f there is even a serious risk that such access can be blocked [by network owners] the market will not fully fund IP-enabled services."[39] AT&T gets the argument exactly backwards. That is, the risk is not that IP-enabled *services* will not be funded, but that if AT&T's proposed regulations are adopted, IP-enabled *facilities* will not be funded. For those facilities are vastly more capital intensive, financially risky, and with longer investment return horizons, than the services which will make use of them. Competitive broadband deployment is hard, expensive and uncertain. Unwarranted regulation can only impede it.

Although companies such as Vonage may be new to this debate, NCTA has previously addressed similar assertions by others. In particular, we have shown that attempts to impose "network neutrality" regulations amount to a solution in search of a problem.[40] Regulation should not be imposed to prevent a merely theoretical threat. There are substantial costs associated with adopting unnecessary regulation, and these costs are incurred by the regulators, by the regulated companies, and by consumers.

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[38] *See, e.g., In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, Comments of AT&T Corp., at 66-69 (Dec. 1, 2000); *In the Matter of Application for Consent to the Transfer of Control of Licenses, MediaOne Group, Transferor, to AT&T Corp, Transferee,* Reply Comments of AT&T Corp. at 68-112 (Sept. 17, 1999).

[39] AT&T at 54.

[40] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, ("Cable Modem Proceeding"), NCTA *ex parte* filing (filed September 8, 2003).

If the Commission were to go down the perilous path of imposing on cable providers and others regulations purporting to ensure "network neutrality," those regulations inevitably would be used by their proponents and others to layer on countless burdensome and unnecessary requirements and to challenge a wide array of business practices as purported impediments to access. Regulation would be used inappropriately, as it often is, as a substitute for, or supplement to, marketplace negotiations in determining the manner in which content, applications and hardware are promoted and made available to consumers. This is why cable operators oppose such regulation even while providing their customers' unfettered access to the Internet.

Ultimately, Vonage itself recognizes that it has not quite made the case for regulation of facilities-based providers, despite filling several pages with its purported rationale for Commission action. As the company concludes, "Vonage urges the Commission to be mindful of net neutrality and pro-active in gathering information about any abuses, *even though immediate action may not be necessary*."[41]

In fact, action is not necessary. The Commission's energies are far better used to break down barriers to facilities-based competition then in adapting counter-productive, monopoly-era regulation to competitive facilities.

B. Imposing New and Discriminatory Fees Will Impede VoIP Deployment

1. Imposing New Universal Service Contribution Obligations on Broadband Service Providers Is Not Within the Scope of This Proceeding

Several commenters representing rural carriers recommend that the Commission use this proceeding to impose new universal service contribution obligations on facilities-based

providers. The imposition of such burdens is unnecessary to achieve the goals of universal service, however, and would in fact harm the goal of widespread broadband penetration. Of course, the issue in the instant proceeding is not the contribution obligation, if any, of facilities-based broadband providers, but the contribution obligations, if any, of IP-enabled services, particularly voice services. The issue of whether facilities-based broadband providers should have any universal service contribution obligation is instead under consideration in the *Wireline Broadband NPRM.*

As the National Telecommunications Cooperative Association ("NTCA") notes, the Commission in this proceeding has asked "whether USF contribution obligations should apply to both facilities-based and non-facilities-based providers of VoIP and IP-enabled *services*."[42] NTCA then proceeds, as does OPASTCO, to argue that broadband facilities-providers should be assessed regardless of the services they, or other application or service providers, may offer through those facilities. OPASTCO, for example, claims that "as more and more voice traffic migrates to IP-enabled services – which is transported, in part, via broadband platforms that do not presently contribute to the USF – the long-term viability of the Fund is threatened."[43]

The appropriate response to this concern, however, is not to assess the broadband facilities, but to assess the IP-enabled voice services. This is all the more so because not all broadband Internet access subscribers will use an IP-enabled voice service in connection with their broadband service, and not all IP-enabled voice services will require subscription to broadband Internet access. Thus, NTCA is mistaken when it asserts that broadband providers whose facilities carry IP-enabled voice traffic "are benefiting from the nation-wide network

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[41] Vonage at 13(emphasis added).

[42] NTCA at 11 (quoting *NPRM* at ¶ 63, emphasis added).

made possible by universal service." The beneficiaries in this context are the subscribers and providers of the IP-enabled voice service, who may or may not be the broadband facilities provider. When the voice provider is not the broadband facilities provider, then the facilities provider will generally receive no compensation from the IP-enabled voice service provider (as is the case today when a cable modem subscriber opts to use Vonage).

The USF responsibility most appropriately lies with the VoIP service provider. Vonage and most other VoIP service providers have in fact advocated accepting that responsibility, once the universal service contribution mechanism is modified.[44] We too have advocated, in this proceeding and elsewhere, changing the universal service contribution mechanism.[45] As we have previously explained, adopting a number-based contribution mechanism would assuage the concerns raised by NTCA and OPASTCO.

A number-based contribution mechanism would answer concerns that voice traffic is migrating to broadband facilities and potentially undermining universal service. A number-based contribution mechanism would ensure that both facilities-based and non-facilities-based VoIP service providers make appropriate contributions to universal service.

OPASTCO expresses concern that when it comes to certain service packages (or bundled offerings) the "precise portion of revenues attributable to interstate telecommunications cannot be easily identified…."[46] A number-based contribution mechanism would obviate the need to make such attributions because the assessment would not be based on the derivation of the revenues.

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[43] *Id*. at 13; *See also* Comments of OPASTCO at 11.

[44] *See* Vonage at 48; *See also* Comments of VON Coalition at 26 and AT&T at 37.

[45] NCTA at 18. *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Reply Comments of NCTA (filed April 18, 2003) at 14 (esp. fn. 25).

Both NTCA and OPASTCO express similar concerns that classification of IP-enabled voice services as information services may make it difficult to determine the assessable telecom portion of the service, or that alternatively the Commission should not adopt an information service classification because of this (and other challenges). Again, a number-based contribution mechanism would address this concern (at least as to USF) as such attributions would be unnecessary. These commenters express concern that some broadband facilities (cable, wireless, satellite) are not assessed, while DSL is assessed for USF purposes. A number-based contribution mechanism, assessed on services regardless of facility, also solves this problem.

Finally, NTCA makes the curious claim that imposing USF fees on broadband facilities would aid broadband deployment, but this has it exactly backwards. Imposing new and substantial fees on broadband services that are not currently assessed would not only impede deployment but "take rates" as well.[47] In any case, the question of whether broadband facilities should be assessed (and as we have shown, they should not) is a question to be decided in the *Wireline Broadband* proceeding, and not here.

2. Imposing Rights-of-Way Fees or Other Fees Only on Facilities-Based Providers Is Not Only Discriminatory but Also Would Impede the Deployment of Broadband Facilities

Local government commenters express concern that facilities owners might somehow avoid compensating local governments for the costs associated with the use of public rights-of-way.[48] In the case of franchised cable operators, such concern is misplaced as cable operators do,

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[46] OPASTCO at 11.

[47] A recent survey conducted by NTCA demonstrated that 92% of its members offer broadband services to at least part of their customer base, suggesting that broadband deployment in rural areas is proceeding at a timely pace in the absence of USF assessment of all broadband facilities. Communications Daily, June 30, 2004, at 7.

[48] *See* Comments of Local Government Coalition at 26; *See also* Comments of City of New York at 9; *See also* Comments of City of San Francisco at 13.

and will continue to, amply compensate local governments for that use. Franchised cable operators, in fact, pay more than $2 billon per year to local governments for the use of public rights-of-way, which is probably well beyond their cost. However, as NCTA has previously demonstrated, most recently in the Section 706 proceeding and more exhaustively in the Cable Modem Proceeding, local governments do not have the authority to impose new obligations solely on franchised cable operators as a result of their provision of new services through facilities occupying public rights-of-way. By virtue of their franchises, such operators have obtained rights to use public-rights-of-way – both for cable and non-cable services. As NCTA explained:

> While local governments may generally manage the use of their rights-of-way, they are precluded by law from requiring a separate franchise for the provision of cable modem service or from assessing additional franchise fees on the revenues from such service. Cable operators use the same facilities and rights-of-way for the provision of both cable service and cable modem service. Pursuant to Section 621 of the Act, franchised cable operators already have the right to use those rights-of-way. And cable operators already pay substantial fees in return for the use of such rights-of-way. Pursuant to Section 622, franchising authorities may charge up to five percent of a cable operator's gross revenues from the provision of cable service – an amount that has grown exponentially over the years and that vastly exceeds regulatory costs and expenses associated with managing rights-of-way. But they may not charge additional fees based on revenues from the provision of a service that, like VoIP service, is not a cable service.[49]

Even if local governments were permitted to impose additional fee obligations on franchised cable operators offering VoIP services, to impose them only on cable operators would clearly be discriminatory because non-facilities based VoIP service providers – and even facilities-based providers not within the jurisdictional reach of municipalities – would have no similar obligation. A fee that discriminates against some or all facilities-based providers would

[49] *See* Reply Comments of NCTA in Cable Modem Proceeding at 3.

not only suppress network investments but also would have the effect of increasing the cost of non-facilities as well as facilities-based VoIP service. If a local government is otherwise empowered to impose a fee on VoIP service, then Section 253 of the Act requires that fee to be imposed on all providers, facilities and non-facilities-based, in a nondiscriminatory manner.[50]

The Local Government Coalition also expresses the concern that Title VI regulated video services will migrate to an unregulated IP platform, though they cite no evidence to that effect.[51] This highly speculative concern is no reason for the Commission to refrain from classifying cable VoIP services in an appropriate manner.

CONCLUSION

For the foregoing reasons, the Commission expeditiously should adopt the minimal regulatory regime for IP-based voice services meeting the four-prong test presented in our initial comments. Cable's provision of VoIP promises to be a breakthrough, facilities-based offering that can redeem the promise of the 1996 Act. Getting the regulatory environment right for cable operators (and others) and ripe for investment, and doing so without delay, should be the Commission's mission in this proceeding. This means the Commission should strive to treat

[50] *See* Reply Comments of NCTA in Cable Modem Proceeding at 28 (explaining that franchise fees may not be imposed on information or telecommunications service revenues). *See also* Section 706 Reply at 8 (explaining the limitations imposed by Section 253 on telecommunications requirements and fees).

VoIP services offered by facilities and non-facilities-based providers equally and reject calls to apply discriminatory regulations or fees to cable broadband facilities and services. Only in this way can the Commission avoid impeding facilities-based voice competition.

Respectfully submitted,

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[51] Local Government Coalition at 28.